FOR ENROLLMENT

RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

COVENTRY HEALTH CARE OF MISSOURI, INC.,
Petitioner,

v.

JODIE NEVILS,
Respondent.

On Writ of Certiorari to the Supreme Court of Missouri

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QUESTIONS PRESENTED

1. Whether FEHBA preempts state laws that prevent carriers from seeking subrogation or reimbursement pursuant to their FEHBA contracts.

2. Whether FEHBA's express-preemption provision, 5 U.S.C. § 8902(m)(1), violates the Supremacy Clause.

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INTRODUCTION

The Supremacy Clause provides that only the "Constitution," "Treaties," and "Laws of the United States" may preempt state law. U.S. Const. Art. VI, cl. 2. Yet, as this Court has recognized, the Federal Employee Health Benefits Act's express preemption clause "declares no federal law preemptive" and instead purportedly "renders preemptive contract terms in health insurance plans." *Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 697-98 (2006). "A prescription of that unusual order," *id.*, cannot, consistent with the Supremacy Clause, trump the law of a sovereign state.

Coventry and the government contend that Congress is free to turn the power to preempt state law over to the terms of contracts so long as some statute "declares" those unseen terms supreme. Pet. Br. 57; U.S. Br. 30. But the Constitution does not allow preemption to be outsourced to contracts, even contracts with a government agency. Contracts are not "laws."

Federal laws (including properly promulgated regulations) may override the States' concurrent exercise of sovereignty because they come with the guarantee of a relatively formal procedure that fosters the fairness and deliberation that should underlie a pronouncement of such force. This process preserves accountability for actions that intrude on state law, and it affords protection to citizens who may hold rights under those laws.

There is no precedent for the rule Coventry urges. Although the U.S. Code is peppered with preemption provisions, FEHBA's is unprecedented. Under Coventry's theory, even a contract between two *private parties* can force state law to yield. Pet. Br. 57-58; U.S. Br. 29-30. As the Chief Justice observed when the Court first confronted this "puzzling" clause a decade ago, a statutory provision that purports to give preemptive force to

the terms of a privately negotiated contract could allow a reimbursement clause requiring repayment at 20% interest to displace any contrary state usury law. And Coventry's novel theory goes beyond the outsourcing of preemption to contracts. If it is right, Congress could simply "declare" that private guidelines to be set in the future by the meat industry, or by an animal-rights group, "shall supersede and preempt" any state law relating to animal welfare.

Although Coventry's attempt to expand this Court's preemption jurisprudence begins at the Supremacy Clause, it does not end there. Joined by the government, Coventry has also proposed an unprecedented expansion of *Chevron* deference that would hand federal agencies the "authoritative" power to displace state law by bureaucratic fiat, on the basis of no more than a generic grant of authority to "administer" a statute. Pet. Br. 52; U.S. Br. 22. But administrative agencies aren't designed to represent the interests of states, and they lack any special authority to referee the delicate balance of state and federal power. Because agencies are creatures of Congress, they must have express authorization from Congress before they can "pre-empt state law directly." *Wyeth v. Levine*, 555 U.S. 555, 576 (2009). FEHBA confers no such authorization.

A ruling endorsing the Office of Personnel Management's preemption regulation would mark a definitive victory in the agency's decade-long crusade against state laws restricting subrogation and reimbursement. But at what cost to principles of federalism? The agency could have asked Congress to amend FEHBA (as it has done many times before) to address any perceived problem with these state laws. It did not do so. It could argue to a court that these state rules stand as an obstacle to the purposes and objectives of the FEHBA program. It did not do that either. Instead, the agency sought a bigger

prize: the power for it (instead of Congress) to decide which state laws survive and which do not. OPM's zeal to short-circuit the legislative and judicial process should not be embraced.

Despite the serious constitutional problems presented here, the Court may resolve this case modestly. In *McVeigh*, this Court found that FEHBA's text is open to two "plausible constructions"—one in which contractual subrogation clauses fall within the statute's compass, and one in which they do not. 547 U.S. at 697-98. The Court also warned that FEHBA's preemption clause "warrants cautious interpretation," and instructed that "a modest reading of the provision is in order." *Id.* Following that lesson here—by adopting an interpretation of FEHBA that does not allow contract terms to preempt state law—would avoid the serious Supremacy Clause issues presented while preserving the States' traditional oversight of insurance regulation.

STATEMENT

I. FEHBA's regulatory background

A. Congress establishes a federal health-benefits program designed to leverage the expertise of the private insurance marketplace.

In 1959, Congress enacted FEHBA, 5 U.S.C. § 8901 *et seq.*, to close the "wide gap" in access to comprehensive health care between federal workers and private employees by giving federal employees "substantially equal" options. H.R. Rep. No. 86-957, at 2914 (1959) (JA 268-69). But while the 1950s saw "spectacular increases" in private "major medical insurance" plans, the federal government lacked "previous experience" in the area. *Id.* at 2915 (JA 270). Congress therefore opted for a decentralized approach that took advantage of the already thriving private-insurance marketplace.

The result, as anyone who has worked for the federal government knows, is that there is no single federal health-insurance provider and no uniform benefits plan. Instead, under FEHBA, employees get a "free choice" from among plans offered by the same insurers that service "private employers" nationwide. *Id.* at 2914-15 (JA 268-70); *see* § 8902(a).

B. Congress taps OPM to negotiate contracts on behalf of the government with private insurers.

The U.S. Civil Service Commission (now known as OPM) was charged with administering the program and negotiating health-insurance contracts. *Id.* at 2916 (JA 272); *see* § 8902; 5 C.F.R. § 890.201-05; 48 C.F.R. § 1602.170-11. Congress established a no-bid contracting process, allowing private insurers to offer existing plans to federal employees. *See* § 8902(a). To be eligible, an insurer must be licensed to provide health insurance under state law, *see* § 8902(b), and provide either an "experience-rated" plan (known as a fee-for-service plan) or a "community-rated" plan (essentially a local health maintenance organization, or HMO). 48 C.F.R. §§ 1602.170-2, 1602.170-7; *see generally* Annie L. Mach & Ada S. Cornell, Cong. Research Serv., *Federal Employees Health Benefits Program (FEHBP): Available Health Insurance Options* 1 (2013) (CRS Report).

The decision to "approve" and offer plans falls entirely within OPM's discretion, and neither the statute nor any regulations allow for judicial review of, or public participation in, the contracting process. *See* 5 C.F.R. § 890.203 (authorizing approval of plans based on the "judgment of OPM").

C. The agency's contracting process generates hundreds of plans offering a wide range of benefit and coverage options.

OPM's annual contracting program has given rise to hundreds of different plan options for federal employees (approximately 256 in 2014). *See* CRS Report at 3. Because OPM enters into contracts with local carriers providing services in specific communities, many of the options are tied to a particular region, meaning that most workers have "10 to 15 different plans" from which to choose, "depending on where the individual resides." *Id.* at 3, 6. In Missouri, federal employees choose from 23 different basic plans—ranging from a fee-for-service Blue Cross plan to a local "Kansas City Metro Area" HMO. Office of Personnel Management, 2015 Plan Information for Missouri, http://bit.ly/2h1jkm3.

Although not every plan or option is available to every federal worker, the program's decentralized, regional nature has created wide variety among the benefits available. Some plans cover just individuals while others cover families. Some plans offer low premiums and a high deductible while others offer the reverse. One policy might cover 10 visits to a certified acupuncturist while another could cover 25. And some plans pay for fertility drugs while others categorically do not. *See id.* FEHBA promotes this variation: Although a benefit plan must "contain a detailed statement of benefits offered," the statute imposes no specific requirements governing its content. *See* § 8902(d).

Premiums are also sensitive to region-specific characteristics. Because premium rates vary widely among states, *see* Henry J. Kaiser Family Found., *Average Per Person Monthly Premiums in the Individual Market, 2013*, http://kaiserf.am/2i1ck02, Congress directed community-rated plans (like Coventry's) to calculate premi-

ums in accordance with the rates of similar plans offered to local private employers, which are bound by applicable state and local laws. H.R. Rep. No. 86-957 at 2923 (JA 286).

When calculating rates, Congress also forbade community-rated plans from taking subrogation and reimbursement directly into account. A community-rated plan like Coventry's cannot carry forward any past "gains and losses . . . in the next year's premium." CRS Report at 4; *see also* 48 C.F.R. § 1602.170-2. It also may not credit any subrogation or reimbursement recoveries back to the government. *See* 48 C.F.R. § 1631.200 (explaining that these "cost principles" apply only to experience-rated plans); 48 C.F.R. §§ 31.201-5, 1631.201-70(a), (g), 1652.216-71(b)(2).

D. Both Congress and OPM repeatedly stress the importance of state regulatory oversight to the FEHBA program.

Because the participation of state-approved private insurers is a key feature of FEHBA, Congress intended the program to work alongside—not against—state law. Acknowledging that "[a]ll states regulate the health insurance business in various and varying ways," S. Rep. No. 95-903, at 7 (1978) (JA 359), Congress did "not design[]" the federal program "to regulate the insurance business or override any State regulatory scheme." Comptroller General of the United States, Gen. Accounting Office, *Conflicts Between State Health Insurance Requirements and Contracts of the Federal Employees Health Benefits Carriers* 15 (1975) (Comptroller Report) (JA 565).

The agency's "position on this matter" is longstanding: It has maintained that "the States have the authority to regulate and tax FEHB carriers." *Id.* at 6 (JA 556). And—at the specific request of Congress—it relayed this

understanding to insurers participating in the program, telling them "that the fact that they are administering a Federal contract is no reason for circumventing compliance with applicable State laws." *Id.* at 16 (JA 566).

FEHBA's dual state-federal regulatory approach has generally worked well. "During the early years," carriers had "few if any problems" complying with both federal and state requirements. S. Rep. No. 95-903, at 7 (JA 359). In the mid-1970s, however, some states began mandating health-insurance coverage for certain "kinds of benefits and medical practitioners"—"chiropractic[] services" or acupuncture, for instance—that were not typically covered by FEHB carriers. *See id.* at 2-4 (JA 353-54). These laws "presented serious problems" for FEHB carriers because they "placed carriers in serious jeopardy of loss of their license in a state unless they were to approve a payment" for a specific type of coverage "not provided under [a FEHB] contract but required by state law." *See id.* at 7 (JA 360); *see also* Comptroller Report at 9-11 (JA 557-61) (discussing representative "examples," including Nevada's law requiring coverage for "traditional oriental medicine, including acupuncture"; Maryland's law requiring payment for "psychologists, regardless of whether they are clinical psychologists"; and Massachusetts' law requiring payment for "inpatient confinement in a mental hospital for at least 60 days").[1]

To address this tension, carriers urged CSC to "issue a regulation restricting the applicability of State law

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[1] By the mid-1970s, many states had also placed restrictions on health-insurance subrogation and reimbursement recoveries. *See infra*, at 12. Yet, in neither its report to Congress nor its testimony in support of the bill did CSC or its carriers ever suggest that any of these laws presented serious problems.

to FEHB contracts." Comptroller Report at 15 (JA 565). The agency refused. *First*, it reiterated that its "position has been that 'the States have the authority to both regulate and tax health insurance carriers operating under [FEHBA].'" *Id.* It therefore told carriers that (1) "the FEHB Act was not designed to regulate the insurance business or to override any State regulatory scheme," and (2) "no legal basis exists for CSC to issue a regulation restricting the applicability of State laws to FEHB contracts." *Id. Second*, the agency's lawyers also informed the carriers that they did "not agree[]" that "the FEHB Act is exempt from State regulation." *Id.*

E. At the agency's request, Congress adds a "limited" preemption clause targeting uniform coverage and benefits.

Although the agency told its carriers that it lacked authority to override state law, it agreed to raise the concern with Congress. S. Rep. No. 95-903, at 3-4 (JA 367). CSC's Comptroller General urged Congress to adopt an express preemption provision for FEHBA that could "provide an immediate and permanent statutory solution to the problem of maintaining uniformity of benefits to all enrollees in [FEHB plans]." *Id.* at 4 (JA 369).

In 1978, Congress responded by adding the following preemption provision to FEHBA:

> The provisions of any contract under [FEHBA] which relate to the nature or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans to the extent that such law or regulation is inconsistent with such contractual provisions.

5 U.S.C. § 8902(m)(1), Pub. L. No. 95-368 (1978).

Both Congress and the agency saw this amendment as "a form of limited preemption." H.R. Rep. No. 95-282, at 6 (1977) (JA 359); *see also* S. Rep. No. 95-903, at 4 (JA 369) (describing the provision as "purposely limited"). It was intended to authorize the FEHB contracts to "preempt the application" of a subset of state laws "which specify types of medical care, providers of care, extent of benefits, coverage of family members, age limits for family members, or other matters relating to health benefits or coverage." H.R. Rep. No. 95-282, at 5 (JA 356); *see also* S. Rep. No. 95-903, at 4 (JA 369) (explaining that the clause "guarantees that the provisions of health benefit contracts . . . concerning benefits or coverage[] would preempt any state and/or local insurance laws and regulations which are inconsistent with such contracts").

To underscore the provision's narrowness, Congress explained that it was "not provid[ing] insurance carriers under the program with exemptions from state laws and regulations governing other aspects of the insurance business." S. Rep. No. 95-903, at 4 (JA 369). CSC was equally clear on this point, emphasizing that FEHBA's preemption clause had "limited applicability" and "would not . . . exempt" those carriers from laws and regulations "pertaining to the regulation of insurance within the State." H.R. Rep. No. 95-282, at 6 (JA 359). Instead, both Congress and the agency stressed that § 8902(m)(1) was intended to address "the problem of maintaining uniformity *of benefits* to all enrollees in the plan." *Id.* at 7 (JA 362) (emphasis added); *see also* S. Rep. No. 95-903, at 6 (JA 374) (reporting to Congress that the clause's aim was to "ensure that benefits and coverage under the program will be uniform").

F. After a second request, Congress amends FEHBA's preemption clause to allow carriers the flexibility to create provider networks.

Twenty years later, Congress amended the provision once again. *See* Pub. L. No. 105-266 (1998). Although the earlier version "prohibit[ed] state and local governments from regulating the nature and extent of coverage and benefits," some newer state laws had begun to interfere with the way "national plans" structured their services. H.R. Rep. No. 105-374, at 19 (1997) (JA 423). As an example, Congress pointed to "State-mandated 'any willing provider' statutes," which "jeopardized" some carriers' "effort[s] to establish a preferred provider organization (PPO) across the country." *Id.* at 9 (JA 403).[2]

To address this specific difficulty, Congress added "new language," that was intended to "preclude" states "from regulating the *provision* of coverage or benefits." S. Rep. No. 105-257, at 15 (1998) (JA 468) (emphasis added). Doing this "broaden[ed]" the clause "to enable national plans to offer uniform benefits and rates to enrollees regardless of where they live." *Id.* at 9 (JA 456); *see also* H.R. Rep. No. 105-374, at 9 (JA 403). But, as before, Congress stressed that "the only effect" of the newly amended clause "would be to limit the application of state law *in some circumstances*"—touching only those "states that have requirements governing what types of organization can provide health care when those requirements are different from those under federal contracts." S. Rep. No. 105-257, at 14 (JA 468-69) (emphasis

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[2] As before, neither OPM nor its carriers identified state insurance-subrogation restrictions as posing a problem. By the time of the 1998 amendments, however, nearly *every* state had adopted some form of state-law restriction on health-insurer-driven subrogation and reimbursement recoveries. *See infra*, at 12.

added); *see also id.* at 12 (JA 461) (noting that, "because the preemption would simply limit the application of state law in some circumstances, . . . the cost to state and local governments . . . would be minimal").

In its current form, the clause now states:

> The terms of any contract under [FEHBA] which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans.

5 U.S.C. § 8902(m)(1).

II. This litigation

In 2006, respondent Jodie Nevils, a longtime postal worker, was injured in an automobile accident. Pet. App. 33a. As a federal employee, he received his health insurance through an OPM-approved plan offered by a local HMO based in Earth City, Missouri and run by petitioner Group Health Plan, now known as Coventry. *Id.* at 33a; JA 79. After Nevils recovered from his injuries, he initiated a tort action against the negligent driver who caused the accident. The parties reached a settlement. Pet. App. 16a. Coventry (through its agent) then asserted a lien on the settlement funds for the medical bills it paid ($6,592.24), and Nevils paid that amount to Coventry. *Id.* Later, Nevils filed suit in Missouri state court challenging Coventry's reimbursement demand. *Id.*

A. Coventry claims that its contract preempts Missouri's insurance-subrogation law.

At the time of Nevils's injuries, Coventry's OPM-approved contract directed it to "seek reimbursement or subrogation when an insured obtains a settlement judgment against a tortfeasor for payment of medical expenses." Pet. App. 45a. Coventry thus argued that, under

FEHBA, its contract superseded Missouri's law barring subrogation and reimbursement. *Id.* at 29a-32a.

Missouri, like nearly every state in the country, has long placed restrictions on health insurers that seek subrogation or reimbursement. *See id.* at 46a; *Travelers Indem. Co. v. Chumbley*, 394 S.W.2d 418, 424 (Mo. Ct. App. 1965).[3] These various restrictions rest principally on the desire to protect the interests of insureds and their families against those of insurance companies. *See* E. Farish Percy, *Applying the Common Fund Doctrine to an ERISA-Governed Employee Benefit Plan's Claim for Subrogation or Reimbursement*, 61 Fla. L. Rev. 55, 57, 65-66 (2009) (explaining that most states have adopted rules to limit subrogation and reimbursement). As one court put it, "[i]t is manifestly unjust to require the recipient of medical payments, who pays a premium for such coverage," to then "act as a collection agency for the paying carrier in a suit against the tortfeasor." *Faust v. Luke*, 364 N.Y.S.2d 344, 347 (N.Y. Civ. Ct. 1975). These laws are also rooted in core tort law principles. *See*

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[3] *See generally* AFHO State Survey of Reimbursement Laws in the Health Insurance Context (Feb. 2014), http://bit.ly/2jpklAr. In many of these states, as in Missouri, laws restricting subrogation and reimbursement have been on the books since well before Congress amended FEHBA to add § 8902(m)(1). *See, e.g.*, Okla. Stat. Ann. tit. 36, § 6092 (1971) ("Limitations on subrogation and setoff under medical coverage"); Kan. Admin. Regs. § 40-1-20 (1966); *State Farm Fire & Cas. Co. v. Knapp*, 484 P.2d 180 (Ariz. 1971); *Berlinski v. Ovellette*, 325 A.2d 239 (Conn. 1973); *Fifield Manor v. Finston*, 354 P.2d 1073 (Cal. 1960); *State Farm Fire & Cas. Ins. Co. v. Farmers Ins. Exch.*, 489 P.2d 480 (Okl. 1971); *Wrightsman v. Hardware Dealers Mut. Fire Ins. Co.*, 147 S.E.2d 860 (Ga. 1966); *see generally* Johnny C. Parker, *The Made Whole Doctrine: Unraveling the Enigma Wrapped in the Mystery of Insurance Subrogation*, 70 Mo. L. Rev. 723, 735-37 (2005).

Great Am. Ins. Co. v. United States, 575 F.2d 1031, 1034 (2d Cir. 1978) (describing subrogation as "an exclusively derivative remedy which depends upon the claim of the insured and is subject to whatever defenses the tortfeasor has against the insured").

B. The Missouri Supreme Court's first decision.

The Missouri Supreme Court rejected Coventry's broad reading and held that FEHBA does not preempt Missouri's longstanding restrictions on subrogation and reimbursement. Its reasoning started with this Court's decision in *McVeigh*, which recognized that FEHBA "is subject to plausible, alternate interpretations" on the question whether it preempts state laws limiting reimbursement or subrogation. Pet. App. 49a (citing *McVeigh*, 546 U.S. at 697). Given this ambiguity, the Missouri court applied the presumption against preemption, and declined to displace Missouri's historic power over insurance and tort law. *Id.* at 51a-54a.

The court further held that its narrow reading comported with well-established practice in insurance law. *Id.* at 53a. The "subrogation provision in favor of [Coventry] creates a contingent right to reimbursement and bears no immediate relationship to the nature, provision or extent of Nevils' insurance coverage and benefits," as required for FEHBA preemption. *Id.* Indeed, the court noted, "Nevils would have been entitled to the same benefits had he never filed suit to recover damages for his injuries." *Id.* So subrogation and repayment may affect the parties' "net financial position *after* the provision of benefits," but it does not "affect the scope of coverage or the receipt of benefits." *Id.* (emphasis added).

Judge Wilson concurred in the judgment, concluding that "the preemption language in § 8902(m)(1) is not a valid application of the Supremacy Clause" and, "as a result, it has no effect." *Id.* at 56a. Reading the statute's

plain language, he reasoned that Congress "plainly intended" to give the terms in Coventry's *contract* preemptive effect. *Id.* at 65a. But "[t]he idea that . . . contract terms that Congress decrees—sight unseen—shall 'preempt and supersede' state law is such an unprecedented and unjustified intrusion on state sovereignty that it almost defies analysis." *Id.* at 66a.

C. OPM attempts to override those courts that refused to allow FEHBA to preempt state laws restricting subrogation.

Coventry petitioned for certiorari. While its petition was pending, OPM jumped into the fray. Purporting to exercise its power under FEHBA's generic grant of authority to "prescribe regulations necessary to carry out this chapter," 5 U.S.C. § 8913(a), OPM issued a regulation directly targeting the preemption issue in this case, *see* 5 C.F.R. § 890.106. That move reversed thirty years of settled practice. From at least 1975 to 2015, the agency had consistently taken the position that it had "no legal basis" under FEHBA "to issue a regulation restricting the applicability of State laws to FEHB contracts." Comptroller Report at 15 (JA 565). Indeed, even after *McVeigh* rejected OPM's plain-language argument, the agency continued to acknowledge its lack of authority to issue a regulation targeting state law, opting instead to produce an informal 2-page "carrier letter" reasserting that § 8902(m)(1) "preempts state laws prohibiting or limiting subrogation and reimbursement." FEHB Program Carrier Letter, at 1 (2012) (Pet. App. 116a).

In lower courts, OPM coupled this letter with a recycled version of its losing *McVeigh* merits brief and argued (once again) that FEHBA unambiguously preempts state subrogation laws. But after *McVeigh*, courts—including the Missouri Supreme Court—refused to permit the agency to alter the scope of preemption.

See Nevils v. Group Health Plan, Inc., 418 S.W.3d 451, 464-65 (Mo. 2014); *Kobold v. Aetna Life Ins. Co.*, 309 P.3d 924, 928-29 (Ariz. App. 2013).

In explicit response to these "state courts," the agency promulgated a rule expansively interpreting FEHBA to authorize contract terms to displace state insurance-subrogation laws. *See* OPM, *Final Rule, Federal Employees Health Benefits Program; Subrogation and Reimbursement Recovery*, 80 Fed. Reg. 29203 (May 21, 2015); 5 C.F.R. § 890.106(h). Although the regulation requires that every FEHB carrier include a "provision incorporating the carrier's subrogation and reimbursement rights," it specified no particular language or clause that these contracts must include, leaving the content of the contracts to future negotiations. *See id.*

The new regulation (which applies "in any pending or future case," 80 Fed. Reg. at 29204) provides:

> A carrier's rights and responsibilities pertaining to subrogation and reimbursement under any FEHB contract relate to the nature, provision, and extent of coverage or benefits (including payments with respect to benefits) within the meaning of 5 U.S.C. 8902(m)(1). These rights and responsibilities are therefore effective notwithstanding any state or local law, or any regulation issued thereunder, which relates to health insurance or plans.

5 C.F.R. § 890.106(h).

OPM made no effort to reconcile the new rule with its earlier position that "no legal basis exists" for the agency to issue "regulation[s] restricting the applicability of State laws to FEHB contracts." Comptroller Report at 15 (JA 565). Instead, the agency finally conceded that § 8902(m)(1)'s text was ambiguous, and argued, in turn, that the regulation's expansive preemption construction was entitled to *Chevron* deference. *See* U.S.

Amicus Br. 12, *Coventry Health Care of Mo., Inc. v. Nevils*, No. 13-1305 (U.S. May 22, 2015). In the wake of this intervening rule, the Solicitor General recommended that this Court remand the case to the Missouri Supreme Court. The Court agreed, remanding "for further consideration in light of new regulations promulgated by [OPM]." *Id.* at 73a.

D. The Missouri Supreme Court's second decision.

On remand, the Missouri Supreme Court rejected OPM's request for *Chevron* deference as inconsistent with this Court's cases, and adhered to its previous opinion. *Id.* at 5a. The court acknowledged the distinction between an agency interpretation of "'the substantive (as opposed to pre-emptive) *meaning* of a statute'" and "'the question of *whether* a statue is pre-emptive.'" *Id.* at 9a (quoting *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 744 (1996)). It observed that "*Chevron* has been applied repeatedly to determine the substantive meaning of a statute," based on general grants of agency authority to administer a statutory scheme (as here). *Id.* at 5a. But, the court observed, "there is no indication that Congress delegated to the OPM the authority to make binding interpretations of the scope of the FEHBA preemption clause," and hence refused to extend *Chevron* deference. *Id.* at 3a, 5a.

Rather, the court explained, the "OPM rule does not alter the fact that the FEHBA preemption clause does not express Congress's clear and manifest intent to preempt Missouri's anti-subrogation law." *Id.* at 13a. And in light of FEHBA's conceded ambiguity, the court again concluded that the presumption against preemption and *McVeigh*'s mandate for a "cautious interpretation" required upholding state law. *Id.* at 7a (citing 547 U.S. at 697).

Judge Wilson, now joined by five other judges (a majority), again concurred on the grounds that FEHBA's "attempt to give preemptive effect to provisions of a contract between the federal government and a private party is not a valid application of the Supremacy Clause." *Id.* at 14a.

SUMMARY OF THE ARGUMENT

FEHBA's express preemption clause cannot properly authorize Coventry's contract terms to displace Missouri's law prohibiting subrogation and reimbursement. Coventry's argument to the contrary rests on a series of unprecedented steps. *First*, that the Supremacy Clause permits Congress to expressly delegate preemptive power to terms in privately negotiated contracts. *Second*, that FEHBA's textual ambiguity must be resolved in favor of preemption—even in the state-dominated arena of insurance law. And *third*, that, even in the absence of any congressional delegation to the agency to expressly preempt state law, OPM's expansive interpretation of FEHBA to do just that deserves *Chevron* deference. Coventry's arguments in support of each of these novel conclusions are unpersuasive, and adopting any of them would have grave implications for the "oldest question of constitutional law": "the proper division of authority between the Federal Government and the States." *New York v. United States*, 505 U.S. 144, 149 (1992).

I. Congress cannot delegate preemptive power to contract terms. The Supremacy Clause instructs that it is the "*Laws* of the United States" that may reign supreme over state law. But "Laws" are official government-imposed policies, not negotiated contracts. Congress—acting within its enumerated powers and through bicameralism, presentment, and other measures ensuring deliberation and democratic participation—may enact statutes that intrude upon state law. And federal

agencies too, through formal rulemaking procedures, can promulgate regulations that carry the force and effect of law. A voluntary, bilateral contract, by contrast, is not a federal "Law" that can force the law of sovereign States to yield. Therefore, even if Congress purports to render yet-unseen contracts preemptive of state law, the Supremacy Clause precludes those contracts from assuming preemptive power. Rewriting FEHBA to say that it is *federal law* that does the preempting, as Coventry suggests, would completely change the statute's meaning. FEHBA unambiguously states that the "terms of any contract . . . shall supersede and preempt" state law.

II. The Court, consistent with its warning that § 8902(m)(1)'s "unusual" prescription "warrants [a] cautious interpretation," can avoid these serious constitutional problems. *McVeigh*, 547 U.S. at 697. FEHBA purports to give preemptive effect only to contract terms that relate to the "nature, provision, or extent of coverage or benefits (including payments with respect to benefits)." In *McVeigh*, this Court recognized that this text is ambiguous on whether contractual subrogation and reimbursement terms "fall[] within § 8902(m)(1)'s compass" because they involve contingent post-benefit payments that stem from "state-court-initiated tort litigation" and do not affect what health-care services a plan participant receives. *Id.* at 697-98. Construing § 8902(m)(1) to leave state laws restricting subrogation and reimbursement in force avoids difficult constitutional problems while vindicating federalism concerns.

III. FEHBA's ambiguity does not justify *Chevron* deference to OPM's quest to expand the scope of FEHBA preemption. The Constitution places the power to preempt state law squarely in the hands of Congress—not unelected bureaucrats. *Chevron* holds that administrative agencies—due to their technical expertise and accountability through the Executive—are entitled

to deference on *policy* questions. But administrative agencies are "clearly not designed to represent the interests of States," and lack any special authority on important issues of state autonomy and federalism. *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 41 (2007) (Stevens, J., dissenting). As a result, this Court has never extended *Chevron* deference to agency interpretations concerning the preemptive reach of statutes—at least not without Congress having clearly delegated that authority. It should not start now. Congress knows how to speak clearly when it decides to empower agencies to make express preemption decisions, and it has done so many times before, including in a parallel federal insurance scheme. Here, Congress has said no such thing.

ARGUMENT

I. The Supremacy Clause does not permit Coventry's contract terms to preempt state law.

A. The terms of contracts cannot reign "supreme" over state law.

1. The Constitution provides that the "*Laws* of the United States" are "the supreme Law of the Land" that are able to preempt state law. U.S. Const. art. VI, cl. 2 (emphasis added). But FEHBA's express preemption clause does something highly "unusual": It purportedly "renders preemptive contract terms in health insurance plans, not provisions enacted by Congress." *McVeigh*, 547 U.S. at 697; *see also id.* at 698 (explaining that the statute "declares no federal law preemptive, but instead, terms of an OPM[-]negotiated contract"). That prescription cannot force state law to give way. The terms of FEHB contracts, which are voluntarily negotiated between private insurance companies and unelected bureaucrats, are not "Laws" capable of displacing the democratic decisions of the sovereign States.

The Constitution gives preemptive force only to "explicit or implicit rules that bind the future exercise of governmental authority." Thomas W. Merrill, *Preemption and Institutional Choice*, 102 Nw. U. L. Rev. 727, 763 (2008). Thus, federal laws (including valid agency regulations) may preempt contrary state law because, unlike "contractual commitments voluntarily undertaken," they "prescrib[e] binding standards of conduct." *Am. Trucking Ass'ns, Inc. v. Los Angeles*, 133 S. Ct. 2096, 2102 (2013). But there is "no constitutional basis for making the terms of contracts with private parties . . . 'supreme' over state law," *Empire HealthChoice Assurance, Inc. v. McVeigh*, 396 F.3d 136, 156 (2d Cir. 2005), and no authority for "the proposition that a contract to which the Federal government is a party somehow constitutes Federal law for the purposes of the supremacy clause," *Arthur D. Little, Inc. v. Comm'r of Health and Hosps.*, 481 N.E.2d 441, 452 (Mass. 1985). Indeed, this Court has *never* "devised and applied a federal principle of law" that terms in "individually negotiated contract[s]" can supersede state law. *United States v. Yazell*, 382 U.S. 341, 353 (1966).

Federalism demands strict adherence to the Constitution's limitations. The Framers "established a careful set of procedures that must be followed before federal law can be created under the Constitution." *Medellin v. Texas*, 552 U.S. 491, 515 (2008). That process, which includes "many accountability checkpoints"—including bicameralism and presentment—is "difficult by design." *Dep't of Transp. v. Ass'n of Am. R.R.s*, 135 S. Ct. 1225, 1237 (2015) (Alito, J., concurring) (quoting John F. Manning, *Lawmaking Made Easy*, 10 Green Bag 2d 191, 202 (2007)).

However difficult, this process is a "valuable feature" of our system, "not something to be lamented and evaded." *Id.* The lawmaking process "tend[s] to foster

the fairness and deliberation that should underlie a pronouncement of such force." *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001). From the standpoint of federalism, requiring some measure of formal process "imposes a degree of accountability on decisions which will have the profound effect of displacing state law, and affords some protection to the states that will have their laws displaced and to citizens who may hold rights or expectations under those laws." *Fellner v. Tri-Union Seafoods, LLC*, 539 F.3d 237, 245 (3d Cir. 2008).

These structural safeguards are entirely absent here. Under FEHBA, "the government does not impose contract terms as it would impose a law." *McVeigh*, 396 F.3d at 144. Instead, OPM, acting solely in its capacity as employer and market participant, "negotiates the contract terms privately with insurance providers who are under no obligation to enter into the contracts in the first place." *Id.* (internal citations omitted). And neither the statute nor any regulations allow for judicial review of, or public participation in, the contracting process. *See* 5 C.F.R. § 890.203. This "contract-based participation in the market" simply cannot exert preemptive force under the Supremacy Clause. *Am. Trucking*, 133 S. Ct. at 2102-03 (holding that actions carrying the "force and effect of law" involve "the State acting as State, not as any market actor").

2. To avoid this conclusion, Coventry argues that "all the Supremacy Clause requires" is some general statutory declaration of preemption. Pet. Br. 56. In its view, because § 8902(m)(1) "*itself* declares that the state and local laws it covers" may be preempted by contract, the mechanism of preemption—privately negotiated contract terms—is irrelevant. *Id.* This theory of preemption is wrong. The source of federal law that *actually* preempts state law matters. It "may be federal common law or the FEHBA statute provisions themselves, but it

must be law—not contract terms." *McVeigh*, 396 F.3d at 145. Section 8902(m)(1), by delegating preemption to the content of future contract terms, leaves the particular targets of preemption to the vagaries of private contracts instead of lawmaking by Congress.

Placing the weight of the Supremacy Clause behind "contract terms that Congress decrees—sight unseen—shall 'preempt and supersede' state law is . . . an unprecedented and unjustified intrusion on state sovereignty." Pet. App. 66a. The constitutional "system of dual sovereignty between the States and the Federal Government" is meant to "ensure the protection of our fundamental liberties," *Gregory v. Ashcroft*, 501 U.S. 452, 457-58 (1991), but it would "dash the whole scheme if Congress could give its power away to an entity that is not constrained by [the lawmaking process]," *Dep't of Transp.*, 135 S. Ct. at 1237 (Alito, J., concurring).

Lacking authority to support its theory, Coventry claims that § 8902(m)(1) is "unremarkable" and "commonplace." Pet. Br. 57-58. It says, for instance, that ERISA's express preemption clause "follow[s] the same approach." *Id.* at 58. But ERISA "expressly stat[es] that the statute's provisions preempt state law," *McVeigh*, 396 F.3d at 143. *See* 29 U.S.C. § 1144(a) (providing that "*the provisions of this subchapter and subchapter III* shall supersede any and all State laws" (emphasis added)). The Federal Arbitration Act provides no support either; it "create[s] a body of federal substantive law of arbitrability" that does the preempting. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). FEHBA, by contrast, "declares no federal law preemptive," just the terms of an OPM-negotiated contract, and it creates no body of federal common law. *McVeigh*, 547 U.S. at 698 (rejecting the applicability of *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988)).

Coventry's only other examples duplicate § 8902(m)(1) and are pasted into other sections of its federal-insurance program. *See* 5 U.S.C. §§ 8959, 8989, 9005(a), and 8709(d)(1).[4] These copycat provisions raise the same constitutional concern—a point this Court acknowledged in *Hillman v. Maretta*, 133 S. Ct. 1943, 1949 (2013), when it declined to address the import of the clause in the Federal Employees' Group Life Insurance Act, 5 U.S.C. § 8709(d)(1). Coventry views that case as embracing this form of "unusual" preemption, but there the Court *avoided* resolving the scope of the express preemption clause, instead limiting its analysis to "conflict preemption principles" not presented here. *Id.*

3. The consequences of Coventry's preemption-by-delegation approach extend far beyond this case. If it prevails, FEHB contract terms could (as the Chief Justice hypothesized at oral argument in *McVeigh*) displace any number of state laws, including those limiting usurious interest on contested reimbursement claims or imposing punitive liquidated damages on workers who resist insurer demands to hand over personal-injury settlements. Tr. of Oral Argument at 17, *McVeigh*, 547 U.S. 677 (2006). Contract terms could also override the longstanding make-whole and common-fund rules, allowing insurers to seize entire settlements (and not pay a share of fees incurred to create and preserve the fund)

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[4] Coventry thinks the statute governing health-insurance benefits to uniformed service members, 10 U.S.C. § 1103(a), supports its theory, but Congress's approach there only illustrates the problem here. The original version of § 1103(a) was identical to § 8902(m)(1), but five years later Congress amended it to specifically eliminate the preemption-by-delegation scheme. *Compare* Pub. L. No. 100-180, § 725(a)(1) (1987), *with* Pub. L. No. 103-160, § 715(a) (1993). Though it has not done so, Congress could have taken the same approach here.

even when the recovery is far less than an insured's actual loss. *See, e.g., Helfrich v. Blue Cross & Blue Shield Ass'n*, 804 F.3d 1090, 1093-94 (10th Cir. 2015) (OPM contract provides for subrogation and reimbursement "even if the enrollee is not 'made whole' for all damages"). And, on Coventry's approach, state laws that protect against contractually imposed damage caps, distant-forum provisions, and other remedy-stripping clauses could be wiped away as well.

Coventry's preemption-by-delegation theory is also not limited to contracts. If Coventry is correct, Congress could outsource the authority to preempt state law to the yet-undecided (and ever changing) standards of an international body, industry group, NGO, or other private party. Consider a statutory provision stating that "any guidelines issued at any time by the National Meat Association relating to the safe and humane handling of animals for human consumption shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to animal welfare." On Coventry's reasoning, such a clause would raise no Supremacy Clause concern because the clause "itself declares that the state and local laws it covers" are preempted. Pet. Br. 56. True, in such a hypothetical no federal agency has a role in the process (as OPM has here by negotiating the contracts), but that is irrelevant for present purposes. In neither instance is a federal agency exercising valid lawmaking authority that would carry the force of law sufficient to fall within the scope of the Supremacy Clause.

It is no wonder that this Court already deemed § 8902(m)(1) a "puzzling measure" that "warrants cautious interpretation." *McVeigh*, 547 U.S. at 697. Congress is, to be sure, "not disabled" from providing FEHB carriers "protection from state interference," U.S. Br. 30, but it must do so within the limits of the Constitution.

B. FEHBA's express preemption clause cannot be saved by rewriting it.

Coventry and the government suggest that this Court could "save" § 8902(m)(1) by construing it to "giv[e] preemptive effect to federal law—not contracts themselves." Pet. Br. 59; *see* U.S. Br. 28 (suggesting that Congress used the phrase "the terms of any contract" as "an easy[] shorthand," by which "the statute, not the contract itself," preempts state law). But that would require rewriting the unambiguous text of the law. The Court has no power to do that. Congress intended a limited form of preemption by authorizing only certain contract terms to preempt state law, but supplying a different mechanism of preemption—federal law—would unavoidably broaden the preemption regime Congress envisioned. *See Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252 (2010) (adding a term to a statute "from which it is conspicuously absent more closely resembles 'invent[ing] a statute rather than interpret[ing] one'").

There is no ambiguity about Congress's intent to "render[] preemptive contract terms in health insurance plans, not provisions enacted by Congress." *McVeigh*, 547 U.S. at 697; *see also McVeigh*, 396 F.2d at 151 (Sack, J., concurring) (observing that FEHBA's preemption provision may be "*unavoidably* unconstitutional"). The statute's text says that "[t]he terms of any [FEHBA] contract . . . supersede and preempt" state law. There is no reference to the statute (or regulations promulgated pursuant to it) preempting state law. And giving contract terms preemptive effect was not a shortcut for incorporating positive federal law as preemptive: The two are not the same. All of FEHBA's statutory provisions and regulations are not placed in every carrier's contract. And FEHB contracts may contain prescriptions that ex-

ist nowhere in the statute. Indeed, their terms are not even consistent across contracts. *Compare Helfrich*, 804 F.3d at 1093-94 (disclaiming the "make whole" rule) *with* JA 120-21 (declining to do the same). Those differences, under Congress's current scheme, matter for preemption.

Congress could easily have followed the approach it has taken in virtually every other context, including ERISA, but instead it "unambiguously provid[ed] for preemption by contract," instructing that "certain types of *contract terms* will 'supersede and preempt' state laws in a particular field." *McVeigh*, 396 F.3d at 143. There is, in short, no plausible alternative interpretation here concerning what carries preemptive force; it is contract terms or nothing. *Warger v. Shauers*, 135 S. Ct. 521, 529 (2014) (explaining that constitutional avoidance "has no application in the absence of ambiguity").

II. FEHBA should be interpreted to avoid preempting Missouri's insurance-subrogation law.

The Court need not invalidate § 8902(m)(1) to resolve this case. Taken together, standard tools of statutory construction show that the better reading does not preempt traditional state insurance-subrogation laws.

A. The text of § 8902(m)(1) is ambiguous.

1. By its terms, FEHBA confers preemptive power on "[t]he terms of any contract . . . which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits)," and allows these (and only these) contract terms to "supersede and preempt" any state law or regulation "which relates to health insurance or plans." § 8902(m)(1). But as this Court explained in *McVeigh*, whether a "reimbursement clause in a master [FEHBA] contract" falls "within § 8902(m)(1)'s compass" is ambiguous. 547 U.S. at 697.

Section 8902(m)(1)'s "words" are "open to more than one construction." *Id.*

Although the legislative history suggests otherwise, one could conceivably regard a contractual reimbursement clause "as a condition or limitation on 'benefits' received by a federal employee." *Id.* On that view, "the clause could be ranked among" those "'contract terms relating to coverage or benefits' and 'payments with respect to benefits.'" *Id.* (alterations omitted). Section 8902(m)(1) would, on that interpretation, infuse these contractual provisions with preemptive power and permit them to displace state law.

"On the other hand," the Court explained, "§ 8902(m)(1)'s words may be read" to more narrowly confine the type of contract term capable of wielding preemptive force. *Id.* "The Act contains no provision addressing the subrogation or reimbursement rights of carriers," *id.* at 683, and, on its face, § 8902(m)(1) limits its delegation of preemptive power to only those contract terms related to coverage or benefits (and benefits payments). But "a claim for reimbursement ordinarily arises long after 'coverage' and 'benefits' questions have been resolved, and corresponding 'payments with respect to benefits' have been made to care providers or the insured." *Id.* at 697. Section 8902(m)(1)'s prescription, therefore, could be understood "to refer to contract terms relating to the *beneficiary's* entitlement (or lack thereof) to Plan payment for certain health-care services he or she has received, and not to terms relating to the carrier's postpayments right to reimbursement." *Id.* (emphasis in original). These two plausible constructions render the text of FEHBA's preemption clause ambiguous.

2. Coventry nevertheless insists that the text "speaks clearly." Pet. Br. 39. In its view, "[s]ubrogation

and reimbursement clauses . . . fall squarely within Section 8902(m)(1)'s plain terms." *Id.* at 39, 27. But the Court rejected this very argument in *McVeigh*, acknowledging the ambiguity by citing directly to the specific pages of the parties' briefs pressing the competing interpretations. *See* 547 U.S. at 697. Coventry would have this Court ignore what it said then, but even the government concedes that the provision is ambiguous. *See* U.S. Br. 14.

Undeterred, Coventry has recycled the same textual arguments that were rejected by this Court in *McVeigh*. Here are the comparisons:

- Pet. Br. 25-26: arguing that reimbursement clauses relate to "benefits or coverage" because an "enrollee's ultimate entitlement to benefit payments is '*conditioned*' from the outset 'upon providing reimbursement from any later recovery'";
- Pet. Reply Br. at 9, *Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006) (No. 05-200): arguing that reimbursement clauses relate to "benefits or coverage" because "benefits payments" "are, at the start, expressly *conditioned* on the enrollee's agreement to comply with the reimbursement provision";
- Pet. Br. 31: arguing that reimbursement clauses relate to "payments with respect to benefits" because "[s]ubrogation and reimbursement recoveries" require the "return" of benefits and so have the "practical effect" of modifying "a prior benefit payment";
- Pet. Reply Br. at 8-9, *McVeigh*: arguing that reimbursement clauses relate to "payments with respect to benefits" because "reimbursement is the return to the Plan of previous payments of bene-

> fits" and so "the benefit payment cannot be separated from the reimbursement obligation."

Neither the words of the statute nor the carriers' textual arguments have changed since this Court considered and refused to accept the same proposed reading a decade ago. The text of the statute was "open to more than one" plausible construction then, and it remains so now. *McVeigh*, 547 U.S. at 697.

3. Coventry again presses ERISA in service of its "plain text" argument. The "texts" of the two preemption provisions, Coventry claims, are "nearly identical," and should be treated the same. Pet. Br. 28. But the texts are meaningfully different. *McVeigh*, 547 U.S. at 698; *see also McVeigh*, 396 F.3d at 147 ("We should be especially reluctant to rely on ERISA-based precedent to justify an expansive interpretation of FEHBA's preemption provision, given the fundamental differences between ERISA and FEHBA.").

ERISA, unlike FEHBA, "purport[s] to render inoperative *any and all* state laws that in some way bear on federal employee-benefit plans" by declaring that "portions" of the statute itself (i.e., federal law) "supersede any and all State law insofar as they may now or hereafter relate to any employee benefit plan." *McVeigh*, 547 U.S. at 698. FEHBA, by contrast, contains no similarly broad preemptive grant. *See id.* Quite the opposite: Section 8902(m)(1) "declares no federal law preemptive, but instead terms of an [OPM]-negotiated contract"—and only certain terms at that—resulting in a more narrowly drawn preemptive sweep. *Id.*

Text aside, Coventry advances a policy reason for importing this Court's interpretation of ERISA here. Coventry speculates that it "is exceedingly unlikely that Congress intended a *broader* role for state law" in the case "of federal employees [for FEHBA] than in the case

of private employees [for ERISA]." Pet. Br. 28. But Congress could have adopted ERISA's preemption provision—drafted less than five years earlier—when it agreed to add a preemption clause to FEHBA in 1978. Instead it opted for a narrower approach. *See McVeigh*, 396 F.3d at 147 (explaining that ERISA's preemption regime "is significantly more comprehensive than FEHBA"). Coventry's plea that this Court "soften the import of Congress' chosen words" is inappropriate. *Lamie v. United States Trustee*, 540 U.S. 526, 538 (2004).

In any case, Coventry's policy argument fails on its own terms because it rests on a misunderstanding of ERISA's treatment of state laws restricting insurance subrogation. Insurance subrogation laws are, as this Court has held, laws that "regulate[] insurance," and, thus, are expressly exempted from ERISA. *FMC Corp. v. Holliday*, 498 U.S. 52, 61 (1990); *see* 29 U.S.C. § 1144(b)(2)(A) (saving from preemption state laws regulating insurance). Adopting a "modest reading" of FEHBA—one that does not abridge state efforts to regulate "the matter of subrogation"—would thus put the two statutes on equal footing, just as Coventry and the government demand.

B. A narrow reading avoids serious constitutional questions and adheres to core federalism principles.

Construing FEHBA in accordance with two longstanding canons of statutory construction—the canon of constitutional avoidance and the presumption against preemption—further comports with this Court's recognition that FEHBA's express preemption clause "warrants cautious interpretation." *McVeigh*, 547 U.S. at 697.

1. "[W]hen deciding which of two plausible statutory constructions to adopt," if "one of them would raise a

multitude of constitutional problems, the other should prevail." *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005). Applying this "cardinal principle" here is straightforward. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988). There are "two plausible statutory constructions" of § 8902(m)(1), and the "expansive" one—in which the terms of Coventry's contract unilaterally supersede Missouri's state law—"raise[s] a multitude of constitutional problems." *Clark*, 543 U.S. at 380-81. Adopting the alternative—and explicitly "plausible"—construction "allows [the Court] to avoid the decision of constitutional questions" because there would be no preemption of state law here. *Id.* at 381. Fidelity to this approach is both prudent and correct. *See DeBartolo*, 485 U.S. at 575. It is also the only valid application of the avoidance doctrine that exists in this case. *See supra*, at 25.

2. Reading FEHBA narrowly also accords "respect for the States as independent sovereigns in our federal system," *Wyeth*, 555 U.S. at 565 n.3, and reflects a fundamental recognition that Congress's decision to "legislate in areas traditionally regulated by the States" is "an extraordinary power" that Congress "does not exercise lightly," *Ashcroft*, 501 U.S. at 460. "[I]n all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied," this Court starts with the "cornerstone" "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth*, 555 U.S. at 565 (alterations omitted). The "effect" of this principle is to "support, where plausible, 'a narrow interpretation' of an express pre-emption provision." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2189 (2014) (Kennedy, J., concurring) (quoting *Medtronic, Inc. v.*

Lohr, 518 U.S. 470, 485 (1996)); *see also Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005).

Following this command places "the power of preemption squarely in the hands of Congress, which is far more suited than the Judiciary to strike the appropriate state/federal balance." *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 907 (2000). By contrast, refusing to exercise caution on questions of preemption jeopardizes the "validity and effectiveness" of state laws that Congress did not intend to displace and a State's own determination of what is "important to its scheme of governance." *See Arizona v. Inter Tribal Council of Ariz. Inc.*, 133 S. Ct. 2247, 2261 (2013) (Kennedy J., concurring).

This "cautionary principle" applies with full force here because the "regulation of insurance, though within the ambit of federal power, has traditionally been under the control of the States." *Arizona*, 133 S. Ct. at 2261 (Kennedy, J., concurring); *Sec. & Exch. Comm'n v. Variable Annuity Life Ins. Co. of Am.*, 359 U.S. 65, 68-69 (1959). As a result, "[w]hen the States speak in the field of 'insurance,' they speak with the authority of a long tradition," requiring that the Court must "start with a reluctance to disturb" any "state regulatory schemes." *Sec. & Exch.*, 359 U.S. at 68. "[W]ithout clear manifestation of congressional purpose," in other words, there can be no preemption of state insurance regulations. *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 387 (2002); *see Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 372 (1955) ("The control of all types of insurance companies and contracts has been primarily a state function since the States came into being.").

Given FEHBA's ambiguity, it cannot be said that Congress "clear[ly] and manifest[ly]" intended to preempt state insurance-subrogation laws. *Rice v. Santa*

Fe Elevator Corp., 331 U.S. 218, 230 (1947). The statute must be construed to avoid preemption.

3. Coventry and the government both insist that this federalism principle does not apply in cases interpreting the scope of express preemption clauses. *See* Pet. Br. 37-38; U.S. Br. 11 (citing *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016)). But the point of cases like *Puerto Rico* is that, where the text of a statute is "plain," the presumption is unnecessary because Congress's "preemptive intent" will be clear. 136 S. Ct. at 1946.

The same is not true where the text itself is open to two plausible constructions. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 533 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("The principles of federalism and respect for state sovereignty that underlie the Court's reluctance to find pre-emption where Congress has not spoken directly to the issue apply with equal force where Congress has spoken, though ambiguously."). With ambiguous express preemption clauses, this Court has routinely cited the presumption against preemption. *See, e.g.*, *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008). And that includes the consideration of express preemption clauses in the health-insurance context. *See, e.g.*, *Cal. Div. of Labor Standards Enforcement v. Dillingham Const., N.A., Inc.*, 519 U.S. 316, 325 (1997) (applying presumption in case concerning ERISA's clause).

Falling back, the challengers see no reason to consider the presumption because (in their view) FEHBA addressed "an area of overwhelming federal interests with a lengthy history of federal regulation." Pet. Br. 37. But that argument "misunderstands the principle." *Wyeth*, 555 U.S. at 565 n.3. The presumption "accounts for

the historic presence of state law but does not rely on the absence of federal regulation." *Id.*

Coventry's analogy to those cases involving areas of nearly exclusive federal regulation also fails. *See Buckman Co. v. Pls.' Legal Comm.*, 531 U.S. 341 (2001) (policing the "relationship between a federal agency and the entity it regulates" through "fraud-on-the-agency" claims); *United States v. Locke*, 529 U.S. 89, 108 (2000) ("national and international maritime commerce" in which "Congress has legislated . . . from the earliest days of the Republic"). FEHBA's regulatory framework is "poles apart." *McVeigh*, 547 U.S. at 700. Although Congress "establishe[d] a comprehensive program of heath insurance for federal employees," this Court already recognized that it did not "purport to render inoperative *any and all* state laws" bearing on "federal employee-benefit plans in general, or carrier-reimbursement claims in particular." *Id.* at 682, 698-99. To the contrary, Congress made clear that (1) "the States have the authority to both regulate and tax health insurance carriers operating under [FEHBA]," and (2) the fact that carriers "are administering a Federal contract is no reason for circumventing compliance with applicable State laws." Comptroller Report at 15-16 (JA 565-66).

Indeed, this Court could hardly have more clearly rejected Coventry's "uniquely federal" theory (at 37) of FEHBA in *McVeigh*. A carrier's contract-based reimbursement claim, this Court explained, "is not a creature of federal law." *McVeigh*, 547 U.S. at 696 (alterations omitted). Instead, a FEHBA-based "reimbursement claim [is] triggered, not by the action of any federal government, agency, or service, but by the settlement of a personal-injury action launched in state court," and "the bottom-line practical issue is the share of that settlement properly payable to the [insurer]." *Id.* at 681. "[C]laims of this genre, seeking recovery from the proceeds of

state-court litigation, are the sort ordinarily resolved in state courts" and are "plainly governed by state law." *Id.* at 683, 698; *see also id.* at 699 (observing that any subrogation claim would also "be governed not by an agreement to which the tortfeasors are strangers, but by state law").[5]

C. Congress passed § 8902(m)(1) to target specific state-benefit laws and did not intend it to be read expansively.

In the absence of any authoritative textual support for its expansive interpretation of the statute, Coventry turns to the provision's legislative history to discern Congress's "purpose." Pet. Br. 32. Coventry insists that this history "erase[s] any possible doubt" that "FEHBA preempts antisubrogation and antireimbursement laws" because it "enacted" the provision to broadly "combat state-law interference with FEHBA plans." *Id.* at 32-33; *see also* U.S. Br. 11. But Coventry relies almost entirely on recent comments made by OPM, *see* Pet. Br. 33-35, rather than on Congress's own contemporaneous statements made during the § 8902(m)(1)'s enactment and amendment. This congressional-intent-by-agency-proxy theory is a nonstarter. It is the "purpose of *Congress*"

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[5] For this reason, too, the government is wrong to suggest that state law is displaced via federal common law, as in *Boyle*. *See* U.S. Br. 30-31. Not even Coventry makes this argument, and for good reason. *McVeigh* thoroughly rejected the idea that reimbursement claims under FEHBA are "pervasively federal" because "an insurer's contract-derived claim to be reimbursed from the proceeds of a federal worker's state-court-initiated tort litigation" is a "nonstatutory issue" that does not fall under "the complete governance of federal law." *See* 547 U.S. at 696. OPM's regulation does nothing more than reiterate the same "federal interests" this Court rejected a decade ago.

that is "the ultimate touchstone in every pre-emption case." *Lohr*, 518 U.S. at 485. And Congress's own contemporaneous commentary demonstrates that it intended a limited—not "sweeping"—form of preemption.

1. In enacting § 8902(m)(1), Congress said that the clause was "purposely limited" to address state laws that "pertain to coverage and benefits," and not to "provide insurance carriers . . . with exemptions from state laws and regulations" "pertaining to the regulation of insurance within the state." S. Rep. No. 95-903, at 3, 7 (JA 369, 375). This "limited" approach flowed directly from Congress's recognition that only *some* state laws had begun to pose "serious problems" for carriers offering certain nationwide plans. *See supra*, at 7 (discussing laws requiring coverage for, among other things, chiropractor and acupuncture services). Neither CSC nor Congress identified any state antisubrogation laws as posing similar problems—despite the fact that numerous states, including Missouri, had imposed these restrictions on insurers for years. *See supra*, at 12.

Congress carefully tailored § 8902(m)(1) to address benefits issues. Some insurers pushed for a broader preemption clause that would allow entire FEHB contracts to "supersede, or take precedence over" even standard insurance laws. Comptroller Report at 14-15 (JA 565). That position gained no traction. Instead, at the suggestion of the agency, Congress installed a narrower preemption regime, emphasizing that administering a federal health contract "is no reason for circumventing compliance with applicable State laws." *Id.* at 16 (JA 566).

Two decades later, Congress amended the preemption clause but left the basic federal-state balance undisturbed. And, as before, no one—not Congress, the agency, or even FEHB carriers—even *identified* state anti-

subrogation laws as worthy of concern, even though by the late 1990s dozens more states had enacted restrictions on subrogation and reimbursement. *See supra*, at 12; *see also* S. Rep. No. 105-257 at 14-15 (JA 468-69)) (stressing that "the only effect" of the newly amended preemption clause "would be to limit the application of state law in some circumstances"—touching only those "states that have requirements governing what types of organization can provide health care when those requirements are different from those under federal contracts").

3. Against this historical record, Coventry invokes "uniformity" and "cost-cutting" concerns. Like the government, Coventry begins with the claim that Congress's goal was to enable "uniform, nationwide application of FEHB contracts." Pet. Br. 16; *see* U.S. Br. 27. Adopting a narrow interpretation would, in Coventry's view, "thwart" this aim by inviting a "motley patchwork of State-specific restrictions." Pet. Br. 34. But that misstates the purpose of FEHBA's preemption clause, which does not render inoperative *any and all* state laws that in some way bear on federal employee-benefit plans in general, or carrier-reimbursement claims in particular. *See* H.R. Rep. No. 95-282 at 4-5 (JA 356-57). To the contrary, Congress explicitly limited its stated preemption goal to only those laws that the agency and its carriers had identified as problematic—those affecting the "uniformity of benefits to all enrollees." *Id.* at 7 (JA 362). Other laws, including state-specific insurance rules, were intentionally left intact, as a crucial component of FEHBA's dual-regulatory approach. *See id.* at 6 (JA 359).

Coventry's focus on the nearly limitless principle of cost savings also overstates the concerns motivating § 8902(m)(1). *See* Pet. Br. 33-34; U.S. Br. 19-20. "[T]here is no federal policy that the fund should always win" in

cases involving state rules that, if enforced, "might deplete" the government's coffers. *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 88 (1994). Indeed, this Court has routinely "rejected 'more money' arguments" in cases where Congress has not "set forth any anticipated level for the fund." *Id.*; *see also Yazell*, 382 U.S. at 348-50 (a federal financial interest "to collect moneys which the Government lends" in "an individualized, negotiated contract" is not enough to displace "state law to the contrary").

The weakness of this cost-cutting argument is underscored by the type of plan at issue here. Coventry's plan is community-rated, and so does not credit *any* of its reimbursement recoveries back to the government and does not use those recoveries at all when setting premiums. *See* 48 C.F.R. § 1631.20048; JA134-35 (requiring that rates "be equivalent" to similarly sized private plans in the region).

That is also why Coventry's concern about "cross-subsidization" falls flat. None of the enrollees in its plan—a local HMO available to federal workers living only in Missouri—will be "treat[ed] differently" or subject to nonuniform rules if Missouri's restriction on subrogation "survive[s] preemption." Pet. Br. 35. What would be "unfair" to Coventry's enrollees (to use its word) would be depriving them of a core state-law protection applicable to all insurers doing business in the state.

D. Reading the clause narrowly will not leave OPM powerless to limit state interference.

An interpretation of § 8902(m)(1) that is faithful to Congress's desire to install a limited preemption regime does not, as the government contends, leave OPM "powerless" to limit state interference with the FEHB pro-

gram. It just requires that OPM achieve its desired goals through valid, democratic means.

OPM could, for instance, simply ask Congress to amend § 8902(m)(1) again. The provision was initially enacted in response to a "serious problem[]" that the agency identified. S. Rep. No. 95-903, at 4, 7 (JA 375). And it was amended "based upon" other "concerns raised" by OPM. S. Rep. No. 105-257, at 2-3 (JA 444). Congress has shown a remarkable responsiveness to OPM's concerns over its ability to administer the FEHB program. *See, e.g.*, H.R. Rep. No. 100-917 (1988) (amending FEHBA to address additional OPM concerns). And, as we have explained above (at 23), there is even a clear blueprint, in the form of 10 U.S.C. § 1103, that offers a workable (and legitimate) approach to preemption in the federal-insurance context.

Congress has also previously amended federal law to add a *statutory* provision relating to insurance subrogation. Medicare was amended after "many years [when] courts were divided about the propriety of the federal government's attempts to recover Medicare expenditures . . . in cases involving tort settlement claims." *In re Zyprexa Prods. Liab. Litig.*, 451 F. Supp. 2d 458, 465 (E.D.N.Y. 2006); *see also* H.R. Rep. No. 108-178(II), at 189-90 (2003) (adding statutory amendment to remedy the effects of "recent court decisions" that would allow "firms that self-insure for product liability" to be "able to avoid paying Medicare for past medical payments related to the claim").

III. OPM's interpretation of FEHBA's express preemption clause should not receive *Chevron* deference.

The government opts not to join Coventry's effort to re-litigate the "plain text" meaning of § 8902(m)(1). Instead, it stakes its case for an expansive construction of

§ 8902(m)(1) on a broader theory: that agency interpretations of the scope of express preemption clauses are entitled to *Chevron* deference. U.S. Br. 14, 20. Coventry agrees. *See* Pet. Br. 42-55.

But this Court has never held that an agency—in the absence of an explicit delegation by Congress—receives *Chevron* deference when it interprets the scope of an express preemption provision. *See Lohr*, 518 U.S. at 512 (O'Connor, J. concurring in part and dissenting in part). And for good reason. Principles of federalism and this Court's *Chevron* doctrine itself show that Congress—not an agency—is vested with that power. Embracing the challengers' novel theory of agency power would jeopardize dual sovereignty, the "defining feature of our Nation's constitutional blueprint." *Fed. Maritime Comm'n v. South Carolina Ports Authority*, 535 U.S. 743, 751 (2002).

A. Congress did not authorize OPM to enact regulations expressly preempting state law.

The agency's assertion of *Chevron* deference stumbles right out of the gate: Congress did not delegate to OPM the authority to issue a regulation expanding the scope of FEHBA's express preemption provision.

1. "[A]n agency literally has no power to act, let alone pre-empt validly enacted legislation of a sovereign State, unless and until Congress confers power on it." *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Were it otherwise, an agency would have the "power to override Congress." *Id.* at 374-75. But lawmaking authority rests with Congress, not agencies, so "[i]t is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

Chevron deference is founded on this principle. A "precondition to deference under *Chevron* is a congressional delegation of administrative authority." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990). What this means is that "*Chevron* deference . . . is not accorded merely because the statute is ambiguous and an administrative official is involved." *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006). Instead, agency interpretations of statutory ambiguities are afforded *Chevron* deference "*because* Congress has delegated to the agency authority to interpret those ambiguities 'with the force of law.'" *City of Arlington v. FCC*, 133 S. Ct. 1863, 1880 (2013) (Roberts, C.J., dissenting) (quoting *Mead*, 533 U.S. at 229). A court, therefore, must inquire "on its own" whether Congress "has in fact delegated to the agency lawmaking power over the ambiguity at issue." *Id.*

Here, that inquiry demonstrates that OPM lacks authority to interpret the ambiguity in FEHBA's express preemption clause. An agency's formal statements on preemption are only entitled to deference if Congress has explicitly "authorized" the agency "to pre-empt state law directly." *Wyeth*, 555 U.S. at 576. And, because Congress "knows how to authorize executive agencies to pre-empt state laws," an explicit authorization is typically not difficult to discern. *Watters*, 550 U.S. at 38 (Steven, J., dissenting, joined by Roberts, C.J., and Scalia, J.). All Congress must do is include some language in the statute specifying that a particular agency has the authority to determine the scope of an express preemption clause or otherwise expressly displace state laws. *See Wyeth*, 555 U.S. at 576 (noting that the FDA was authorized by 21 U.S.C. § 360k(b) to "determine the scope of the Medical Devices Amendments' pre-emption clause"). Consider these few illustrative examples:

- A congressional command that, if the FCC "determines" that a state law violates an express

preemption clause, it shall "preempt the enforcement" of the state law. 47 U.S.C. § 253(d);

- A delegation to the Secretary of Transportation to "issue a decision" on "whether [a state] requirement is preempted" by an express preemption clause and to "prescribe regulations for carrying out" that decision. 49 U.S.C. § 5125(d);
- A specific authorization to the Secretary of the Interior to "set forth any State law or regulation which is preempted and superseded" because it conflicts with "the purposes and the requirements of this chapter." 30 U.S.C. § 1254(g);
- An instruction that state laws "relating to health insurance" are preempted "to the extent that the Secretary . . . determine[s] that" (1) the state law is "inconsistent with a specific provision of the contract," or (2) preemption is "necessary to implement or administer the provisions of the contract or achieve any other important Federal interest." 10 U.S.C. § 1103.

FEHBA, however, contains no such command. Unlike the preceding examples, when Congress enacted FEHBA it included nothing more than a garden-variety instruction to OPM to "prescribe regulations necessary to carry out this chapter." 5 U.S.C. § 8913. That is not enough. *See Wyeth*, 555 U.S. at 576; *compare Lohr*, 518 U.S. at 495-96 (explaining that Congress "explicitly delegated" the agency "a unique role in determining the scope of the [statute's] pre-emptive effect."); *City of New York v. FCC*, 486 U.S. 57, 67-69 (1988) (concluding that Congress gave a "straightforward endorsement" of an agency's exercise of express preemptive authority). Generic rulemaking authority is commonplace in the U.S. Code, but it says not a word about preemption, so there

is simply no evidence that Congress sought to grant the agency power to patrol the state-federal borderline.

2. Requiring that Congress be clear when it intends to lodge authority to expressly preempt state law with an executive agency also serves certain crucial separation-of-powers interests that were not triggered in *Chevron*.

First, *Chevron*'s animating principle of deference rests on "a presumption that Congress, when it [leaves] ambiguity in a statute," is "implicitly" delegating policy questions "for the agency to fill." *Smiley*, 517 U.S. at 740-41; *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843-44 (1984). That holds particularly for "technical and complex" *policy* questions, over which agencies have "great expertise." *Chevron*, 467 U.S. at 865. But there is no reason to presume that agencies are experts on the "overall distribution of governmental authority and the intrinsic value of preserving core state regulatory authority." Nina Mendelson, *Chevron and Preemption*, 102 Mich. L. Rev. 737, 742 (2004). Agencies may have "a unique understanding of the statutes they administer," *Wyeth*, 555 U.S. at 577, but knowing what a statute actually does is distinct from knowing whether the statute should preempt state law—that is "not a policy judgment within the agency's expertise." Ernest Young, *Executive Preemption*, 102 Nw. U. L. Rev. 869, 889 (2008).

Second, *Chevron* took its cue from the division of decisional authority. The question in *Chevron* was whether Congress would want agencies, rather than "federal judges—who have no constituency"—to make choices that center "on the wisdom of the agency's policy." 467 U.S. at 866. Given that choice, siding with agencies made sense because, "while not directly accountable to the people," agencies are more democratically accountable than courts. *Id.* at 865. But this calculus changes in the

preemption context, where the authority of sovereign states is paramount. Because the "state institution is likely to be both closer to the people and, in the case of state legislatures . . . directly accountable to them," *Chevron*'s "democratic legitimacy justification for deferring to the federal agency simply does not apply." Young at 887. "Put another way, *Chevron* describes how judges and administrators divide power. But power to define [preemption] is not theirs to divide." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 731 (6th Cir. 2013) (Sutton, J., concurring).

Instead, the Constitution places "the power of preemption squarely in the hands of Congress," not unelected bureaucrats. *Geier*, 529 U.S. at 907. And the Framers believed that States, through their representatives in Congress, could play a critical role in drafting legislation and protecting state sovereignty. James Madison explained that the Congress "will partake sufficiently of the spirit [of the States], to be disinclined to invade the rights of the individual States, or the prerogatives of their governments." The Federalist, No. 46 at 297 (James Madison) (Clinton Rossiter ed., 1961); *see also Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 550 (1985) ("[T]he principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself.").

3. The government and Coventry nevertheless maintain that FEHBA's generic grant is sufficient. U.S. Br. 22; Pet. Br. 47. In their view, FEHBA's "general conferral of rulemaking authority" entitles the agency to *Chevron* deference over its interpretations of "all of the Act's parts—including its preemption provision." U.S. Br. 22. That sweeping view, however, would silently unlock *Chevron* deference for agency interpretations of express preemption clauses in *any* statute that includes a similar

generic delegation and, in turn, radically shift the source of authority for displacing state law from Congress to the Executive (and executive agencies, no less). Even those lower courts that ruled in favor of preemption here wouldn't agree. *See Bell v. Blue Cross & Blue Shield*, 823 F.3d 1198, 1203 (8th Cir. 2016) (declining to adopt the argument regarding agency authority); *Helfrich*, 804 F.3d at 1109 (same). And if it were true that a "general conferral" clause suffices, then Congress's frequent *specific* delegations to agencies to expressly preempt state law would be unnecessary and redundant.

Consider Coventry's lead case, *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013). Coventry contends (at 48) that it holds that a "'general conferral' of rulemaking authority" automatically hands agencies *Chevron* deference for rules expanding the scope of express preemption clauses because "there are no subject-matter specific exceptions to *Chevron*." Once "an agency is authorized to interpret a statute," Coventry says, that authorization "empowers" agencies "to interpret *every* aspect of the statute"—"including" the scope of express preemption clauses like "Section 8902(m)(1)." Pet. Br. 47-48.

City of Arlington does not bear the weight of Coventry's theory because, as the Court emphasized, the case had "nothing to do with federalism." 133 S. Ct. at 1873. Unlike FEHBA, the statute there "explicitly supplant[ed] state authority." *Id.* So the Court had to determine whether "unelected federal bureaucrats" or "unelected . . . federal judges" were entitled to interpret the scope of a statutory "jurisdiction" provision. *Id.* at 1866. Either way, that question was "not a debate about whether the States [would] be allowed to do their own thing." *Id.*; *see also Cuomo v. Clearing House Ass'n LLC*, 557 U.S. 519, 525, 534 (2009) (refusing to accord *any deference* for the agency's interpretation of an express preemption clause because it was impermissible

and declining to squarely decide whether federalism concerns would have made the agency's effort otherwise invalid).

To ensure that Congress—rather than administrative bureaucrats or unelected judges—yields the power of preemption, courts require a clear statement from Congress. *Lohr*, 518 U.S. at 485. Given that agencies are "clearly not designed to represent the interests of States" and lack any special authority on important issues of state autonomy and federalism, it would be anomalous to assume that Congress would, without saying so explicitly, expect them to pronounce on preemption. *Watters*, 550 U.S. at 41 (Stevens, J., dissenting).

B. OPM's regulation is not a substantive rule entitled to *Chevron* deference.

To say that an agency gets no *Chevron* deference (absent specific congressional delegation) for regulations interpreting the scope of an express preemption clause is not to say that agency regulations can have no *effect* on preemption. This Court has drawn a clear distinction between "question[s] of the substantive (as opposed to preemptive) *meaning* of a statute," and questions over "*whether* a statute is preemptive." *Smiley*, 517 U.S. at 744. A properly promulgated substantive regulation may receive *Chevron* deference and, as a result, displace state law through some form of *implied* preemption. But an agency that issues a regulation expressly displacing state law and argues that a court, in turn, must defer to that pronouncement is on unprecedented footing. Not surprisingly, then, the government recasts OPM's regulation as a run-of-the-mill substantive regulation, and argues that "the only question is a substantive question"—

albeit about the "scope" of § 8902(m)(1). U.S. Br. 24. That is wrong.[6]

1. Substantive questions about the scope of an express preemption clause are still questions about "whether a statute is preemptive." *Smiley*, 517 U.S. at 744. As this Court explained in *Lohr*, when "presented with the task of interpreting a statutory provision that expressly pre-empts state law," although the text establishes that "Congress intended . . . to pre-empt at least some state law," the core preemption "analysis" turns on determining "the scope of the pre-emption statute." 518 U.S. at 484 (interpreting an express preemption clause *requires* "identify[ing] the domain expressly pre-empted"). That the statute expressly preempts *some* laws, in other words, does not (absent clear congressional delegation) free an agency to conclude that it preempts *more* laws.

The Court has already rejected the theory that a regulation can avoid being considered preemptive when it purports "only" to interpret a key phrase in an express preemption clause. In *Cuomo*, the Comptroller claimed that his regulation interpreting the term "visitorial powers" in the National Bank Act's express preemption

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[6] For the same reason, the government reframes OPM's regulation as an interpretation of the meaning of "limitations" on "benefits" under § 8902(d) (stating that FEHB contracts must contain a detailed statement of "limitations" on "benefits"). But (even if applicable), the agency never cited § 8902(d) as a basis for its regulation. Pet. App. 164a. Yet "[i]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). And, had OPM issued a regulation defining "limitations" on benefits for purposes of § 8902(d), the argument for preemption would be on an implied, not express, basis. No such argument has been made here.

clause was a nothing more than a substantive regulation that, as in *Smiley*, only produced "practical effect[s]" for preemption. Fed. Resp. Br. at 9, 2009 WL 815241, *Cuomo* (No. 08-453). But, as this Court explained, "[a]ny interpretation of 'visitorial powers' necessarily 'declares the preemptive scope of the NBA'" because the "purpose and function of the statutory term . . . is to define and thereby limit the category of action . . . forbidden to the states." *Cuomo*, 557 U.S. at 535. "If that is not preemption, nothing is." *Id.*

A regulation expanding the category of state laws that must give way, both as a matter of "logic" and "application," is an "incursion upon state powers." *Id.* That is exactly what OPM's regulation seeks to do. By "purport[ing] to settle the scope of federal preemption" through its regulation, OPM has "transform[ed] the preemption question from a judicial inquiry into an administrative *fait accompli*." *Watters*, 550 U.S. at 40 n.24 (Stevens, J. dissenting).

2. Any effort to treat the regulation as "substantive" is also undermined by the *way* in which substantive regulations can preempt. The government is correct that an agency's interpretation of a substantive provision may receive *Chevron* deference even if the interpretation "ha[s] preemptive effect." U.S. Br. 21. But the Court has never "deferred to an agency's *conclusion* that the state law is preempted." *Wyeth*, 555 U.S. at 576. Rather, an agency interpretation of a substantive provision that may have preemptive impact still requires a court to "perform[] its own conflict determination, relying on the substance of state and federal law and not on agency proclamations of pre-emption." *Id.*

That Coventry has declined to advance any argument in favor of implied preemption here discredits the "substantive regulation" theory. Had it genuinely

thought the regulation was substantive, it could have argued that requiring the inclusion of subrogation and reimbursement clauses in all FEHB contracts impliedly preempted state anti-subrogation laws either because they impossibly conflict or frustrate the purposes and objectives of the FEHBA scheme. *See, e.g.*, *Hillsborough Cnty., Fla. v. Automated Med. Labs, Inc.*, 471 U.S. 707, 713 (1985); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 705 (1984); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 154-59 (1982). In that instance, a court could determine whether there is truly an implied conflict.

C. OPM's interpretation nonetheless fails under *Chevron*.

Evaluating OPM's regulation within *Chevron*'s two-step framework—though inappropriate—reinforces why deference is impermissible here. At both steps, OPM was required to consider the significant federalism implications of its rule expanding the reach of FEHBA's express preemption clause. To claim an entitlement to deference, an agency must take seriously its obligations to thoroughly analyze the questions and meaningfully engage with inconvenient facts or competing principles. Other agencies do. *See, e.g.*, 74 Fed. Reg. 1770, 1792 (2009) (DOT regulation addressing applicability of presumption against preemption). And OPM has too. *See* 59 Fed. Reg. 48,765, 48,767 (1994) (OPM regulation addressing applicability of constitutional avoidance doctrine). Yet OPM's regulation here cast them off entirely, with no explanation. The Court should not reward the agency for such dismissive rulemaking.

1. Under traditional canons of statutory construction, OPM's regulation cannot pass *Chevron* step one.

The "critical" point in any statutory interpretation case is that "[r]ules of interpretation bind all interpreters, administrative agencies included." *Carter*, 736 F.3d at 731 (Sutton, J., concurring). Thus, "[d]eference comes into play only if a statutory ambiguity lingers after deployment of all pertinent interpretive principles," including the traditional canons of statutory construction used to discern Congress's intent. *Id. See also INS v. St. Cyr*, 533 U.S. 289, 320 n.45 (2001) ("We only defer, however, to agency interpretations of statutes that, applying the normal 'tools of statutory construction,' are ambiguous." (quoting *Chevron*, 467 U.S. at 843 n.9)). Put another way, an agency's interpretation of a statute "does not prevail whenever the face of the statute contains an ambiguity." *Carter*, 736 F.3d at 731 (Sutton, J., concurring). Instead, because "traditional presumptions about the parties or the topic in dispute may limit the breadth of ambiguity," they must be considered at *Chevron* step one. *Commonwealth of Massachusetts v. Dep't of Transp.*, 93 F.3d 890, 893 (D.C. Cir. 1996) (Sentelle, J.).

This rule applies to "[a]ll manner of presumptions, substantive canons and clear-statement rules." *Carter*, 736 F.3d at 731 (Sutton, J., concurring) (collecting cases, applying rule of lenity); *see, e.g.*, *Wyeth*, 555 U.S. at 576 (presumption against preemption); *DeBartolo*, 485 U.S. at 574-76 (constitutional avoidance canon). These rules "take precedence over conflicting agency views," *Carter*, 736 F.3d at 731, because if interpretive principles resolve any statutory doubt, "there is, for *Chevron* purposes, no ambiguity in such a statute for an agency to resolve." *St. Cyr*, 533 U.S. at 320 n.45.

Here, two tools of construction, the presumption against preemption and the canon of constitutional avoidance, resolve the textual ambiguity and leave nothing for OPM to resolve.

a. The presumption against preemption, when applied in the face of an ambiguous express preemption clause, forecloses an agency's reliance on statutory ambiguity to unlock *Chevron* deference. That is because "an agency cannot supply, on Congress's behalf, the clear legislative statement of intent required to overcome the presumption against preemption." *Desiano v. Warner-Lambert & Co.*, 467 F.3d 85, 97 n.9 (2d Cir. 2006) (Calabresi, J.), *aff'd by an equally divided court sub. nom. Warner-Lambert Co., LLC v. Kent*, 552 U.S. 440 (2008). The presumption is "in significant part an effort to promote congressional—rather than executive or bureaucratic—deliberation on certain issues, and to cabin executive officials by calling for express legislative authorization." Cass R. Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071, 2114 (1990).

In the government's view, the presumption is inapplicable because applying it to agency interpretations would result in a "one-way ratchet" against preemption. U.S. Br. at 25 (or, as Coventry argues at 21, the presumption would always "trump[]" *Chevron*). But *Chevron* and the presumption are not at odds; *Chevron* accepts that agencies, not courts, should make *policy* choices. But when the choice implicates displacement of state law, the presumption "does not snatch a policy decision from the political branches. It instead insists that the choice to [expressly preempt state law] be made by the first political branch, rather than the second." *Carter*, 736 F.3d at 732 (Sutton, J., concurring). The "ratchet," in other words, is Congress's to control.

b. The canon of constitutional avoidance, too, ends the *Chevron* inquiry at step one. As this Court has explained, the canon constrains an agency's discretion to interpret statutory ambiguities, even when *Chevron* deference would otherwise be due. *DeBartolo*, 485 U.S. at 575; *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-73 (2001). OPM's regulation—which adopts a constitutionally questionable construction of § 8902(m)(1)—is openly at war with this principle. *See DeBartolo*, 485 U.S. at 575 (rejecting agency interpretation where it would not avoid constitutional concerns); *Miller v. Johnson*, 515 U.S. 900, 923 (1995) (rejecting "agency interpretations to which we would otherwise defer when they raise serious constitutional questions").

2. OPM's interpretation of § 8902(m)(1) is unreasonable.

OPM's regulation also fails at *Chevron* step two. To be reasonable, the agency was required to meaningfully deliberate on the federalism (and constitutional) concerns relevant to this case, especially because it switched positions on its power to interpret § 8902(m)(1). Yet the regulation contains no reasoning justifying its cavalier assault on longstanding state laws.

a. An agency's interpretation of an express preemption clause is not "permissible" if it conflicts with "the strong presumption against preemption in matters traditionally regulated by the state." *Massachusetts*, 93 F.3d at 894. "[A]n agency, no less a court, must interpret a doubtful [preemption clause] in favor of [state sovereignty]." *Carter*, 736 F.3d at 731 (Sutton, J., concurring). Deference, in short, "is not abdication." *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 260 (1991) (Scalia, J., concurring in part and concurring in judgment). It requires, instead, that courts "accept only those agency

interpretations that are reasonable in light of the principles of construction courts normally employ." *Id.* But, without explanation, OPM ignored key canons that bear on this case. This breach of proper interpretation "demand[s]" that the agency interpretation be "reject[ed]." *Massachusetts*, 93 F.3d at 895; *see also Solid Waste Agency*, 531 U.S. at 166-67, 174 (where Congress "chose to 'recognize, preserve, and protect'" state authority to regulate, courts must "reject the request for administrative deference" of a statutory interpretation that would undermine that choice).

b. OPM's inconsistent positions on its preemptive power further undermine the reasonableness of its interpretation. *See Wyeth*, 555 U.S. at 579 (rejecting the unexplained "dramatic change in [agency] position" on preemption).

In the run-up to § 8902(m)(1)'s passage, the agency made clear that FEHBA's general grant of rulemaking authority provided "no legal basis" to issue "regulation[s] restricting the applicability of State laws to FEHB contracts." Comptroller Report at 15 (JA 565). And it told Congress that, despite FEHBA's generic grant to "prescribe regulations to implement th[e] law," the statute "does not give [the agency] clear authority to issue regulations restricting the application of state laws." S. Rep. No. 95-903, at 4 (JA 370). Without any explanation for its shift, OPM now asserts that the same generic grant of authority that precluded agency regulations expressly preempting state laws forty years earlier now specifically authorizes it.

What's more, Congress responded to the agency's repeated assertions that it lacked the requisite preemptive power to effectuate the statute's purposes—adding and amending § 8902(m)(1) as the agency requested. As this Court has explained, where Congress "has affirma-

tively acted" in reliance "on the representations of [an agency] that it had no authority" to regulate, the agency is "preclude[d] . . . from regulating" even if the agency later opts for a "change in position." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 156 (2000); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (rejecting "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation").

* * * *

Given the "sheer amount of law . . . made by [administrative] agencies," *INS v. Chadha*, 462 U.S. 919, 985-86 (1983), the assumption that agencies have the authority to determine the scope of their own preemptive power could have grave consequences for state sovereignty. To earn legitimacy, agency power must emanate from a specific congressional delegation. *Chevron*, 467 U.S. at 843-44. It is crucial that courts safeguard this requirement, especially on questions directly altering the delicate balance between state and federal sovereignty, and especially where (as here) the assertion of agency power would raise serious constitutional problems. This Court should therefore decline OPM's invitation to radically expand the reach of administrative agencies to displace state law.

CONCLUSION

The Missouri Supreme Court's judgment should be affirmed.

Respectfully submitted,

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